

Dias Costelloe (Migration) [2018] AATA 4495 (2 October 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Mrs Claudina Dias Costelloe
CASE NUMBER: 1713461
DIBP REFERENCE(S): BCC2016/2033590
MEMBER: Adrienne Millbank
DATE: 2 October 2018
PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations.

Statement made on 02 October 2018 at 5:42pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – genuine spousal relationship – marriage certificate – joint bank account – car registration – name on bills – resided together – social media posts – hastily arranged marriage – online messaging – statutory declarations – decision under review affirmed

LEGISLATION

*Migration Act 1958 (Cth), ss 5CB, 5F, 65
Migration Regulations 1994 (Cth), rr 1.09A, 1.15A, Schedule 2 cls 820.211, 820.221*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 21 June 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 13 June 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a). The Delegate considered the evidence and information provided in relation to the matters prescribed under regulations 1.15A and 1.09A not sufficient to demonstrate that the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Migration Act.
4. As discussed below, information and evidence was provided to the Tribunal that was not available to the Delegate.
5. The applicant appeared before the Tribunal on 26 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor.
6. The applicant was represented in relation to the review by her registered migration agent, who attended the hearing.
7. The applicant and sponsor were articulate and forthcoming at hearing; the evidence they provided was consistent, plausible and compelling; and the Tribunal accepted their testimony.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The applicant was born in Brazil in 1982 and is 36 years old at the time of decision. She first arrived in Australia on 19 August 2014 on a Student (Subclass 570) visa, and studied English with the purpose of pursuing post-graduate studies in her home country and a career in the health sector. She returned to Brazil on 19 March 2015. At the time of decision she is working as a Toxicology Account Manager in Brisbane.
10. The sponsor was born in Ireland in 1970, and is 48 at the time of decision. He arrived in Australia in February 2001 on a Working Holiday (Subclass 417) visa and was granted an Employer Nomination (Residence) (Subclass 856) visa in December 2001. Since arriving in Australia he has worked in the construction industry, as a project manager and at the time of decision a general manager.
11. Neither of the parties declared previous relationships. They claim they first met in November 2014; the applicant moved in with the sponsor in January 2015; they communicated with each other after the applicant returned to Brazil in March 2015; the sponsor visited her in Brazil from 24 December 2015 – 9 January 2016; and they committed to a shared life

together on 4 April 2016, after the applicant returned to Australia on a Visitor visa on 19 March 2016.

12. The parties claim they sought advice from the Department of Home Affairs that they could marry and lodge a Partner visa onshore before the applicant's Visitor visa expired. They married on 21 May 2016, and the application was lodged on 13 June 2016.

The issue

13. The issue in the present case is whether the parties were in a genuine spousal relationship at the time of application and this decision.
14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who an Australian permanent resident.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
16. A copy of the parties' Queensland marriage certificate was provided, certifying that they married on 21 May 2016, in the Brisbane Registry Office. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship

17. At the time of application, evidence was provided in the form of a letter from the sponsor's bank that the applicant had been issued a card enabling her to draw from the sponsor's personal bank account.
18. At the time of decision the parties operate a joint bank account, into which their salaries are deposited, and from which household expenses including mortgage and utilities payments, are made.
19. The parties have registered a car in joint names. At hearing, the sponsor advised that the mortgage on the apartment where the parties live, that he purchased five years previously, is still in his name. He advised that he had decided it was not worth the expense of changing the title on the property, and that they are saving to purchase a house together.
20. The parties have named each other as beneficiaries in their superannuation accounts.
21. While they do not as yet have joint ownership of significant assets such as real estate, or significant joint liabilities, the Tribunal accepts, on the evidence provided, that the parties

have pooled their financial resources and that they share day-to-day expenses as a married couple.

Nature of the household

22. Copies of mail, including electricity and water bills in joint names, were provided, addressed to the parties at the same Bulimba address.
23. The applicant at hearing described how she did most of the cooking and housework before she obtained full-time employment and that since this time, while she does most of the cooking, they have employed a weekly cleaner, and share the remaining housework. In written statements she described herself as chief decorator.
24. The parties do not have children, and so have not shared joint responsibility for the care and support of children in their household. In their written submissions and at hearing they stated that it is their intention to purchase a house together, with a yard, and to have children.
25. At hearing the sponsor advised that while the applicant moved into his Bulimba apartment with him in 2015, before she returned to Brazil, she did so partly because she needed to relocate, and in the context of their then boyfriend-girlfriend relationship. He stated that they have lived in his Bulimba apartment together since the applicant's return from Brazil in March 2016, and that since April 2016, they have lived together as a committed couple.
26. From the evidence provided, the Tribunal is satisfied that the parties have established a joint household where they have lived together as a committed and spousal couple, since April 2016.

Social aspects of the relationship

27. Printouts of the parties' Facebook entries show them presenting themselves as a couple; announcing and sharing their wedding with friends and family; in Brazil and Ireland together in 2016 and 2017; and on trips together to Noosa, the Gold Coast, and Byron Bay.
28. Photos further to those on Facebook also show the parties as a couple, together, with friends and with family members. The applicant described at hearing how her mother died in 2009; how she never knew her father, and learned as an adult that he had died; and how she has a half-brother with whom she has only a limited relationship. Photos shown to the Tribunal included those of the sponsor together with the applicant's family-surrogate friends in Brazil.
29. The sponsor stated that he informed his parents and other family and friends of his intentions to marry, and shared aspects of his wedding with them via Skype and Facebook. The parties advised, and the photos show, that about 26 of their friends attended their wedding reception.
30. Photos were provided of the parties together with the sponsor's parents and siblings and friends in Ireland. Copies of greeting cards with messages of love to the parties, from the sponsor's parents and other family members, were provided. Copies of cards and messages from the sponsor's family members, and friends, at the time of the parties' marriage were also provided, in which they express regret at not being able to attend the wedding.
31. Statutory declarations were provided at the time of application by friends of the parties who observed their relationship develop from 2014. A further four statutory declarations were provided to the Tribunal, by friends who declared they have known the parties as a couple since 2014, attended their wedding, and could attest to the genuineness of the relationship.

32. In written statements and at hearing the applicant described how the parties entertained as a couple, and socialised at weekends.
33. The Tribunal is satisfied, on the evidence provided, that the parties represent themselves to other people as married to each other; that their friends, acquaintances and family members recognise and relate to them as a married couple; and that they plan and undertake joint social activities as a married couple.

Nature of persons' commitment to each other

34. Printouts of messages from internet messaging applications confirm the parties' claims that they missed each other after the applicant returned to Brazil in March 2015; that the sponsor travelled to Brazil in December 2015 to be with the applicant; and the applicant returned to Australia in March 2016 to be with the sponsor. Copies of greeting, including wedding anniversary cards, were provided in which the parties expressed love and commitment to each other.
35. The Tribunal questioned the parties about their hastily-arranged marriage, with no family members in attendance. The parties acknowledged that their marriage was organised in some haste, and for the purpose of lodging the Partner visa application. They explained, and the Tribunal accepts, that they arranged it together, and hastily, while the applicant was on a three-month Visitor visa, for the reason that they did not want to be separated again and to have to return to conducting a long-distance relationship. They claimed, and the Tribunal accepts, that they would have married anyway; that they were both adults, happy in and committed to the relationship.
36. The Tribunal accepts that the parties have been in a relationship since 2014, and that they have lived together as a married couple for over two years, since May 2016. From their statutory declarations, messages to each other, testimony and presentation at hearing, the Tribunal is satisfied that the parties have drawn and continue to draw companionship and emotional support from each other, and that they see the relationship as long-term.

Findings

37. Having considered r.1.15A(3) matters the Tribunal finds that the parties do have a mutual commitment to a shared life to the exclusion of all others; that they are in a genuine and continuing relationship; and that they live together and not separately and apart on a permanent basis.
38. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
39. Therefore the applicant meets cl.820.211(2)(a).
40. The parties are both over 18 years of age; the sponsor is the spouse of the applicant; and the applicant was the holder of a substantive visa at the time of application. Therefore she meets cl.820.211(2)(c) and cl.820.211(2)(d). Therefore she meets cl.820.221.
41. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

42. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).